Supreme Court, U.S.
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No. 00 779

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART; JANET NAPOLITANO, ATTORNEY GENERAL,
PETITIONERS,

-VS-

KEVIN DEE POLSTON
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), allow Arizona state prisoners in noncapital cases to bypass routinely available discretionary review by the Arizona Supreme Court and submit their claims directly to federal court for habeas corpus review under 28 U.S.C. § 2254?

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OPINION BELOW

In *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999), the United States Court of Appeals for the Ninth Circuit held that, in noncapital cases, Arizona state prisoners need not seek discretionary review by the Arizona Supreme Court in order to exhaust state remedies for federal habeas purposes, even though discretionary review is available to "any party" under Rule 31.19, Arizona Rules of Criminal Procedure. To reach that conclusion, the Ninth Circuit relied on erroneous dictum in a case from Illinois, *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), that mischaracterized the holding of an Arizona case. The Ninth Circuit held that *O'Sullivan*. "implicitly overruled" existing Ninth Circuit law requiring the exhaustion of discretionary review in Arizona. This Court denied certiorari. *Sublett v. Swoopes*, 120 S. Ct.1996 (2000).

Following *Swoopes*, the panel in this case reversed and remanded. The panel relied on the same erroneous dictum in *O'Sullivan*, and perpetuated the same mischaracterization of Arizona law made by this Court in *O'Sullivan*. App. A.

STATEMENT OF JURISDICTION

The State respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in *Polston v. Stewart*, No. 99–15472. The United States Court of Appeals for the Ninth Circuit issued its decision on June 15, 2000. App. A. The State timely sought rehearing and rehearing en banc, which the Ninth Circuit denied on July 31. App. B. The State timely filed this petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED

Rule 31.19 of the Arizona Rules of Criminal Procedure provides, in pertinent part:

> **a. Time for Filing; Cross-Petition.** Within 30 days after the filing of a decision [by the Court of Appeals] or within 15 days after the clerk has mailed notice of the determination of a motion for reconsideration, any party may file with the clerk of the Court of Appeals a petition for review by the Supreme Court.

Rule 111 of the Rules of the Arizona Supreme Court provides, in pertinent part:

> **(g) Depublication**. [A]n opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

STATEMENT OF THE CASE

On the basis of overwhelming evidence, which included Kevin Dee Polston's three tape-recorded confessions, the testimony of eyewitnesses, videotapes that captured him committing the robberies, and his own testimony, the jury convicted Polston of multiple counts of armed robbery, aggravated assault, and first-degree burglary in May 1991. On June 10, 1991, the trial court sentenced him to concurrent terms, the longest of which was 28 years. He did not appeal.

In 1993, retained counsel filed a petition for post-conviction relief alleging that Polston was incompetent to be tried and that his counsel was ineffective. After an evidentiary hearing in 1994, the trial court denied relief, but granted Polston's motion to file a delayed appeal, which he consolidated with a petition for review from the trial court's denial of post-conviction relief.

In the combined delayed appeal/petition for review, Polston's attorney raised several issues of ineffective assistance. The Arizona Court of Appeals granted review, but denied relief. Polston then sought discretionary review from the Arizona Supreme Court on his claim of incompetence to be tried, and on one claim of ineffective assistance. The Arizona Supreme Court denied review without comment.

Polston, through counsel, sought habeas corpus relief in 1997. The district court held that he had properly exhausted only one of his claims of ineffectiveness because he presented only that claim to the Arizona Supreme Court after the court of appeals affirmed the trial court. Thus, the rest of his claims of ineffective assistance were procedurally barred.

The Ninth Circuit granted a certificate of appealability only on the issue of whether the district court properly held the additional claims of ineffectiveness procedurally barred due to Polston's failure to present them in the petition for review to the Arizona Supreme Court. Following *Swoopes v. Sublett*, and this Court's opinion in *O'Sullivan v. Boerckel*, the Ninth Circuit reversed and remanded, holding that Polston did not have to present the additional ineffectiveness claims to

the Arizona Supreme Court in order to satisfy the doctrine of exhaustion. The Ninth Circuit denied the State's timely motion for rehearing and suggestion for rehearing en banc.

REASON WHY THE WRIT SHOULD ISSUE

SUMMARY OF THE ARGUMENT

The recent *per curiam* opinion by a three-judge panel of the Ninth Circuit in *Swoopes v. Sublett,* 196 F.3d 1008 (9th Cir. 1999), held, in reliance on erroneous dictum in this Court's opinion in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), that the Arizona Supreme Court does not wish to exercise its discretionary appellate jurisdiction in non-capital criminal cases involving denial of post-conviction relief. Consequently, the Ninth Circuit ruled that, in non-capital cases, Arizona state prisoners who seek federal habeas relief need not first exhaust that avenue of potential review, even though it is available to "any party" under Rule 31.19, Arizona Rules of Criminal Procedure. Relying on *O'Sullivan* and *Swoopes,* the panel in this case reached the same erroneous conclusion: in non-capital cases, Arizona state prisoners need not seek discretionary review by the Arizona Supreme Court after denial of post-conviction relief in order to satisfy the requirement of exhaustion. The panel's decision in this case violates this Court's mandate in *O'Sullivan* that discretionary review, if available, *must be exhausted.*

This Court should grant certiorari for several reasons. First, this is a matter of great importance in § 2254 habeas litigation deriving from Arizona's courts. The erroneous reasoning of *Swoopes*, if allowed to go uncorrected and unquestioningly followed, as it was in this case, will adversely affect thousands of § 2254 habeas cases in the District of Arizona by ignoring, wholesale, all procedural defaults at the very stage of review that this Court and federal circuit courts nationwide regard as dispositive for exhaustion purposes—the state's highest court. Arizona prisoners need not seek discretionary review *even though it is available to all and is a part of ordinary appellate procedure*. According to the

Ninth Circuit, Arizona prisoners need not do what *O'Sullivan* expressly requires: exhaust available state remedies. 119 S. Ct. at 1733–34.

Second, the Ninth Circuit's decision would regularly deprive the Arizona Supreme Court of the opportunity to review federal claims because it effectively encourages Arizona prisoners not to bother filing petitions for discretionary review—the only source of the Arizona Supreme Court's appellate jurisdiction in non-capital criminal cases. The Ninth Circuit's shortcut-to-federal-court rule makes a mockery of the doctrine of comity, expressly championed in *O'Sullivan*—the federal courts' long-held preference for allowing the state courts a *full* and fair first opportunity to pass on questions of federal constitutional law. 119 S. Ct. at 1732.

Third, the Ninth Circuit's decision in this case, insofar as it unquestioningly follows *Swoopes* without independent analysis of the Arizona cases cited in that opinion, has no factual support. The Arizona Supreme Court has never discouraged or prohibited timely petitions for discretionary review of meritorious claims. Indeed, every year it grants review on the merits of many such petitions, as shown by the statistics set forth in detail below. Discretionary review by the Arizona Supreme Court is expressly available to "any party" under Rule 31.19(a), Arizona Rules of Criminal Procedure (promulgated by the Arizona Supreme Court), and is a commonly pursued, ordinary feature of appellate review in Arizona. Where discretionary review is available, state prisoners must seek it before they advance their claims to federal court. *O'Sullivan*, 119 S. Ct. at 1733–34.

Finally, this Court's dictum in *O'Sullivan* about Arizona case law is wrong, as explained in detail below. *O'Sullivan* concerned Illinois procedural law, not Arizona law. In deciding that case, this Court neither received nor solicited any input from Arizona. Had Arizona been a party, the State would have had an opportunity to urge reconsideration of the erroneous dictum. Instead, Arizona has no recourse except to earnestly implore this Court to grant certiorari, analyze Arizona law properly, and to correct the fiction the Ninth

Circuit has constructed on erroneous dictum that Arizona had no opportunity to challenge. 119 S. Ct. at 1733.

ARGUMENT

A. THE ARIZONA SUPREME COURT REGULARLY EXERCISES ITS DISCRETIONARY APPELLATE JURISDICTION AND HAS NEVER EXPRESSED ANY "WISH" TO FOREGO IT.

In dictum, while deciding a question of Illinois law in *O'Sullivan*, this Court erroneously cited Arizona's *State v. Sandon*, 777 P.2d 220 (1989), as an example of a state court that "d[oes] not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." 119 S. Ct. at 1733–34. That assertion, adopted by the *Swoopes* panel, and followed by the panel in this case, is simply wrong.

1. The right to petition for discretionary review by Arizona's highest court is available to all criminal appellants, as a regular part of Arizona's appellate procedure.

Arizona Rule of Criminal Procedure 31.19(a)[1] expressly makes discretionary review available to "any party" to a criminal appeal, and the following statistics from the Arizona Supreme Court's records demonstrate the frequent and abundant invocation of the right to seek review.[2] In 1989, 290 criminal petitions for discretionary review were submitted to the Arizona Supreme Court; 260 were disposed of by order, 21 resulted in opinions, and 17 were resolved by memorandum

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1. Rule 32.9(g), Arizona Rules of Criminal Procedure, which governs petitions for review after denial of post-conviction relief, provides that petitions for discretionary review from the court of appeals' denial of review shall be governed by Rules 31.18 and 31.19.

2. Source: Arizona Supreme Court, Administrative Office of the Courts, per Mark J. McDermott, June 24, 1999, and January 5, 2000. These statistics are public records.

decision. In 1990, 310 were submitted, 246 were disposed of by order, and 19 were resolved by written opinion. In 1991, 349 petitions were submitted, 306 were disposed of by order, and 25 resulted in opinions. In 1992, 366 were submitted, 346 were disposed of by order, and 21 resulted in opinions. In 1993, 550 petitions were submitted, 521 were disposed of by order, and 12 resulted in written opinions. In 1994, of a total of 499 petitions, 488 were disposed of by order, 10 by opinion, and one by memorandum. In 1995, 484 criminal petitions for discretionary review were filed, 474 were disposed of by order, 8 resulted in written opinions, and 3 in memoranda. In 1996, 662 petitions were filed, 613 were resolved by order, 15 resulted in written opinions, and 6 were disposed of by memorandum decision. In 1997, 583 petitions were filed, 626 were disposed of by order, 15 by opinion, and 2 by memorandum decision.

In 1998, the most recent full year of statistics currently available, 584 criminal petitions for discretionary review were filed, 451 were disposed of by order, 14 resulted in written opinions, and 3 were resolved by memorandum. By mid-year (July 1), 1999, 450 new criminal petitions had already been filed, 506 had been disposed of by order, 5 had resulted in written opinions, and one had been resolved by memorandum.

The reality is inescapable: the right to file a petition for discretionary review by the Arizona Supreme Court is available to any party in a criminal case, and such petitions are filed by the hundreds every year.[3] As shown above, in the past decade alone criminal petitions for discretionary review have resulted in 160 published opinions by the Arizona Supreme Court. Undeniably, petitions for review are a major source of issues for the exercise of that court's

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3. See also Rule 111(g), Rules of the Arizona Supreme Court, which allows that court to depublish an opinion that the intermediate Court of Appeals has certified for publication, but only if the case is "before the [Arizona] Supreme Court" on a petition or cross-petition for discretionary review, or by special action. The Arizona Supreme Court could not have promulgated this rule while intending to forego its jurisdictional prerequisite. Instead, this is another indication of the Arizona Supreme Court's desire to control Arizona law by exercising discretionary review.

discretionary jurisdiction. These statistics demonstrate overwhelmingly that petitions for discretionary review in criminal cases are an ordinary, integral feature of the appellate process in Arizona. Under such circumstances, *O'Sullivan v. Boerckel* requires exhaustion of discretionary review. 119 S. Ct. at 1733.

The central premise in the Ninth Circuit's *Swoopes* opinion—which the panel in this case followed without independent analysis—appears to be that certain language in the Arizona Supreme Court's 1989 *Sandon* opinion somehow rendered discretionary review "unavailable" and "outside the standard review process." *Swoopes*, 196 F.3d at 1010. The *Sandon* opinion did no such thing; *Sandon did not even concern a first petition for discretionary review*—which was the sole subject of *O'Sullivan*!

2. What was the Arizona Supreme Court's holding in Sandon?

After the Arizona Court of Appeals affirmed his convictions, Mark Sandon filed, through counsel, a petition for discretionary review. 777 P.2d at 220. The Arizona Supreme Court ultimately denied review. *Id.* Up to that point, nothing out of the ordinary had occurred—most petitions for discretionary review are denied. Having had his direct appeal and having sought discretionary Arizona Supreme Court review, Sandon's appeal was "over," as far as the state courts were concerned, just as it would have been under the Illinois appellate system in *O'Sullivan*.

The issue addressed in *Sandon* arose later, after the dismissal of Sandon's federal habeas petition for lack of exhaustion. When he returned to the state courts, he filed additional claims in a procedurally irregular *second* (successive) petition seeking Arizona Supreme Court review. 777 P.2d at 221. The Arizona Supreme Court held that Sandon's *second* petition was precluded due to procedural default. *Id.* In other words, Arizona law did not permit Sandon to add more claims in a successive petition—claims that had been raised in the Arizona Court of Appeals, but not included in the original petition for review. *Id.* As the *Sandon* court explained, issues decided by the Court of

Appeals but not included among those raised in Sandon's original petition for discretionary review were "no longer open to substantive review in this Court, or in any other court in Arizona [unless cognizable in collateral, post-conviction relief proceedings]." *Id.* Sandon had procedurally defaulted those additional claims by failing to advance them in the original petition for discretionary review. *Id.*

The Ninth Circuit's perception of *Sandon*'s language as a comment on the *O'Sullivan* question of availability distorts both fact and law—*Sandon* is entirely inapposite because it was a successive-petition case. It did not concern the right to file an *initial* petition for discretionary review—the sole subject matter of *O'Sullivan*.

The State respectfully urges this Court to read *Sandon* anew, objectively, to appreciate the inaccuracy of the "*Sandon*" dictum in *O'Sullivan*. This Court's reference to *Sandon*, in *O'Sullivan*, as an example of a state court reluctant or unwilling to accept timely original petitions for discretionary review of federal claims, was simply wrong. Moreover, the *O'Sullivan* exhaustion rule turns on the availability of the remedy of discretionary review, not on whether the caseload resulting from defendants' seeking it might be "unwelcome" in the state courts. 119 S. Ct. at 1734. Where the remedy of discretionary review is available under state law, as it clearly is in Arizona, federal law requires its exhaustion. 119 S. Ct. at 1733–34, citing 28 U.S.C. § 2254(c).

B. WHAT COULD EXPLAIN *O'SULLIVAN*'S MISINTERPRETATION OF *SANDON*?

The Ninth Circuit has misread *Sandon* in every instance, apparently believing that it dealt with an original petition for discretionary review rather than a precluded, *second* attempt to obtain discretionary review. Apparently, this Court, whose focus was on Illinois law in *O'Sullivan*, was misinformed about Arizona law due to the prior errors of lower federal courts.

The first misinterpretation occurred in *Jennison v. Goldsmith*, 940 F.3d at 1309–10. In that *per curiam* opinion, the Ninth Circuit declared,

broadly, that *Sandon* held, "a petitioner need not seek review by the Arizona Supreme Court to exhaust state remedies for purposes of federal habeas." 940 F.2d at 1309. This was manifestly incorrect, as explained above. A footnote in *Jennison* accurately related Sandon's procedural history, but the footnote concluded with the following misstatement:

> The Arizona Supreme Court dismissed the petition on the ground that for federal habeas purposes state remedies were exhausted as to Sandon's claims *once presented to the Arizona Court of Appeals*.

940 F.2d at 1309–10 n.2 (emphasis added). *Sandon* held no such thing; it held only that there were no state remedies available for claims that Sandon's attorney had not advanced in the timely *original* petition for discretionary review. 777 P.2d at 221. State remedies were "exhausted," the *Sandon* court wrote, because they were no longer available. *Id.*

Jennison's *per curiam* misreading of *Sandon* was perpetuated in *Harmon v. Ryan*, 959 F.2d 1457 (9th Cir. 1992), decided without the benefit of any briefing by the State of Arizona, where Judge Reinhardt wrote:

> *Sandon* held that an Arizona prisoner who, in 1986, had not sought state supreme court review after his conviction was affirmed by the state court of appeals had nonetheless exhausted his state remedies for purposes of federal habeas review.

959 F.2d at 1460. That statement was blatantly incorrect because Sandon had sought discretionary review once before by the Arizona Supreme Court, but only with respect to three of his twelve claims. What *Sandon* held was simply that the *remaining* claims—those that had been omitted from the timely original petition for review—could not be raised later in an out-of-time, successive petition for review. "The case in the Arizona courts is over," the *Sandon* court wrote, because Sandon's

attorney had properly exhausted the claims he raised in the first petition for review and had procedurally defaulted the rest. 777 P.2d at 221.

Jennison's distortion of *Sandon*, perpetuated in *Harmon v. Ryan*, has been relatively harmless until now because *Jennison* made clear, in 1991, that the federal courts, not the Arizona Supreme Court, dictate the requirements for exhausting state remedies for federal habeas purposes. 940 F.2d at 1311 n.4. *Jennison* and subsequent cases also made clear that discretionary review by the Arizona Supreme Court was available and that seeking it was a prerequisite to exhausting state remedies. 940 F.2d at 1312; *Harmon v. Ryan*, 959 F.2d at 1461; *Coley v. Gonzales*, 55 F.3d 1385, 1388 (9th Cir. 1995).

Today, however, we have confusion: the misinformed dictum in *O'Sullivan v. Boerckel*, and now the Ninth Circuit's *Swoopes v. Sublett* opinion, both erroneously touting *Sandon* as an example of a state court that "do[es] not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." Unfortunately, in *O'Sullivan*, where the primary focus was Illinois law, this Court may have relied on the erroneous pronouncements in *Jennison* and *Harmon* without questioning their accuracy or making any independent inquiry into Arizona law. It is time to return to the source, the actual Arizona law (*Shattuck*, *Sandon*, and Rule 31.19, Ariz. R. Crim. P.), and to apply it with precision.

C. THIS COURT MUST NOT ALLOW THE REASONING OF *SWOOPES* TO STAND.

The ideal solution to this problem would have been an amended *O'Sullivan* opinion omitting the mistaken reference to *Sandon*, but Arizona was not a party in *O'Sullivan* and thus had no avenue of appeal. Nevertheless, this Court can avert further confusion by rectifying the misconstruction of *Sandon* and, most important, by declaring that despite any suggestion to the contrary in *O'Sullivan*, Arizona state prisoners, including those who have received life sentences, must petition for discretionary review by the Arizona Supreme Court in order to exhaust claims that were presented to the Arizona Court of Appeals,

and must include in the petition for review all such claims that they wish to exhaust.

The State urges this Court to read the Arizona cases anew, with objectivity, caution, and deference to the Arizona Supreme Court's intimate knowledge of state law, rather than relying on previous misinterpretations by others. *State v. Shattuck* and Rule 31.19(a) expressly guarantee the opportunity (the right) to seek discretionary review of meritorious appellate claims, either through counsel or *pro se*. 684 P.2d at 156–58.[4] *State v. Sandon* had nothing to do with either the original appeal as of right or with the right to timely seek discretionary review by the Arizona Supreme Court—the two components of Arizona's two-tiered appellate procedure. Mark Sandon himself, through counsel, timely demonstrated the availability of an original Rule 31.19 petition for discretionary review. The *Sandon* opinion, which rejected a *successive* petition, simply does not, and cannot, stand for the proposition that a timely initial petition for discretionary review is

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4. Frivolous, no-merit claims *are* discouraged in Arizona, of course, as they are in all state and federal courts, and such issues should not be included in a petition for discretionary review. *State v. Shattuck*, 684 P.2d 154, 158 (1984) ("Neither retained nor appointed counsel should seek review by this court when the only issues that can be raised are without merit or frivolous"); *see Clark v. Ricketts*, 958 F.2d 851, 857 (9th Cir. 1991) (to remit frivolous habeas claims to state court for exhaustion would be "senseless"). The Arizona Supreme Court narrowly defines a frivolous issue as "one that 'indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.'" *Evans v. Arthur*, 678 P.2d 943, 944 n.1 (1984). Only in such an instance (or if the claim is procedurally precluded, as in *Sandon*) does the court discourage petitions for discretionary review. *See id.*

Nothing in Arizona law, despite what *O'Sullivan* suggests, discourages the advancement of arguably meritorious claims by way of a timely petition for discretionary review. See Comment to Rule 31.19, Ariz. R. Crim. P. ("The 1983 amendments to Rule 31.19 contemplate that review will not be sought as a matter of course. *Review procedure is intended for those cases in which there is a tenable claim involving substantial issues of law or procedure, or in which serious injustice is claimed to have occurred*") (emphasis added). If a claim is tenable, Rule 31.19 is an available avenue of review. Every year, hundreds of Arizona prisoners take advantage of their right to pursue it.

"unavailable" or even "discouraged" in Arizona, or that discretionary review may be bypassed on the way to federal court. Nor does anything else in Arizona law support that notion. The remedy is available and must be exhausted.

The Ninth Circuit's reference in the *Swoopes* opinion to *Moreno v. Gonzalez*, 962 P.2d 205 (1998), is inapposite. *Moreno*, which construed a rule governing collateral review procedures, draws a distinction between "appeals," where the defendant has a *right of review*, and discretionary petitions for review, where the defendant has only the right to *seek* review—not an "appeal" because review is only discretionary. 962 P.2d at 207. The Ninth Circuit's reliance on *Moreno*'s definition of "appeal" in a collateral-review context begs the question in the instant case: whether the right to *seek* discretionary Arizona Supreme Court review is available as a part of Arizona's procedures on direct appeal. *O'Sullivan*, 119 S. Ct. at 1734.

The Ninth Circuit's reliance on *Shattuck*, too, is illusory, because the *Swoopes* opinion quotes only selectively from *Shattuck*: "[o]nce the defendant has been given the appeal to which he has a right, state remedies have been exhausted." The *Swoopes* court apparently disregarded the two crucial sentences that directly follow that language in *Shattuck*:

> The defendant, of course, may petition for review *pro per*. We *will consider* the grounds set forth in such petitions.

140 Ariz. at 585, 684 P.2d at 157 (emphasis added). Hundreds "such petitions" are filed every year, and, as promised in *Shattuck*, all are considered by the Arizona Supreme Court.

Finally, one must also keep in mind that in neither *Shattuck* nor *Sandon* did the Arizona Supreme Court have the benefit of *O'Sullivan's* recent clarification of the federal exhaustion rule—that seeking discretionary review is part of the exhaustion requirement where discretionary review is available. State-court language like the phrases quoted out of context in the *Swoopes* opinion might warrant strict

interpretation if uttered after *O'Sullivan*, but it is quite a stretch to regard decade-old, *pre-O'Sullivan* statements about exhaustion as if they had taken *O'Sullivan* into account.

The ramifications of the Ninth Circuit's *Swoopes* opinion are unacceptable. Out of whole cloth the Ninth Circuit has created a "bypass-the-Arizona-Supreme-Court" rule that not only violates *O'Sullivan* but will effectively deprive Arizona's highest court of its appellate jurisdiction in innumerable cases, offend the long-held doctrine of comity, and dramatically increase the number of claims that the federal habeas courts must address on the merits. Moreover, habeas petitioners undoubtedly will argue that this new rule applies retroactively because, if the fiction that the Ninth Circuit has invented is upheld, then Rule 31.19 petitions, thousands of which have been filed, docketed, and adjudicated in the past decade, supposedly have been "unavailable," and "outside the standard review process" since 1989, when the *Sandon* decision was published. By sheer judicial fiat, the Ninth Circuit has effectively written Arizona's Rule of Criminal Procedure 31.19 out of existence for federal exhaustion purposes.

The trouble would not end there. While some future federal habeas petitioners would forego any state court litigation beyond the Arizona Court of Appeals and go directly to federal court, many could be expected to avail themselves of all the alternative avenues of appeal, which means they would very likely generate chaotic parallel state and federal litigation by seeking Arizona Supreme Court discretionary review and federal habeas review simultaneously.

Not only would parallel litigation potentially render the federal action a complete waste of time if relief were granted by the Arizona Supreme Court; prisoners who file one federal habeas action directly after finding no relief in the Court of Appeals can be expected to file another habeas after being denied relief on a Rule 31.19 petition, because, according to the *Swoopes* panel's reasoning, a Rule 31.19 petition for review, being "outside the standard review process," would necessarily be regarded as a separate action under state law—something akin to collateral proceedings rather than part of the direct appeal.

Also, consider the effect, under such circumstances, of a belated plain-statement ruling by the Arizona Supreme Court that a claim was procedurally defaulted in the trial court. Should a federal habeas court, having already addressed that same claim on the merits for lack of a finding of procedural default in the Arizona Court of Appeals, revisit the judgement and find the claim precluded from federal review after all? The implications of the Ninth Circuit's opinion raise serious questions whether future federal habeas proceedings in the District of Arizona can be conducted in any orderly manner.

The ensuing dramatic drain on federal judicial resources is easy to foresee—all because of the mythification of an Arizona opinion that had nothing to do with the subject matter of *O'Sullivan*. This Court should avert these untoward consequences by granting review, vacating the Ninth Circuit's decision in this case, and making clear that seeking discretionary review by the Arizona Supreme Court is a prerequisite to non-capital § 2254 federal habeas litigation in the District of Arizona.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

FILED
June 15, 2000
CATHY A. CATTERSON
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN DEE POLSTON	)	No. 99-15472
	)	
Petitioner-Appellant,	)	D.C. No. CV-97-00019-JMR
	)	
v.	)	MEMORANDUM[1]
	)	
TERRY L. STEWART,	)	
	)	
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Submitted June 13, 2000[2]
San Francisco, California

1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

2. The panel unanimously finds this case suitable for submission without oral argument pursuant to Federal Rule of Appellate Procedure 34(a)(2).

Before: LAY,[3] D.W. NELSON, and THOMAS, Circuit Judges

The district court, on January 8, 1999, denied Kevin Dee Polston's request for habeas corpus relief filed pursuant to 28 U.S.C. § 2254 (1994); Polston raised claims of incompetency and ineffective assistance of counsel. Among the grounds for denying relief was the court's determination that Polston had procedurally defaulted on all but one of his ineffective assistance claims by failing to present them to the Arizona Supreme Court in his petition for discretionary review. Polston subsequently filed a notice of appeal to the Ninth Circuit and a motion for a certificate of appealability. See 28 U.S.C. § 2253(c) (1994). On May 18, 1999, we granted the motion with respect to whether the district court properly dismissed Polston's ineffective assistance of counsel claims as procedurally defaulted. We find that the court erred.

State prisoners must exhaust their remedies in state court before a federal court may grant habeas relief. See 28 U.S.C. § 2254(b)(1). the Supreme Court has interpreted this exhaustion requirement to mean that state prisoners must invoke one complete round of a state's established appellate review process, including discretionary review in a state court of last resort, before presenting their claims to a federal court in a habeas petition. See O'Sullivan v. Boerckel, 526 U.S. 838, 842-44 (1999). The Boerckel Court, citing Arizona as an example, was, however, careful to note that a state may deem a specific state remedy to be unavailable for exhaustion purposes. See id. at 847-48.

Contrary to the government's assertion here, the Arizona Supreme Court has clearly stated that state remedies are exhausted for federal habeas corpus purposes once the defendant has been given the appeal to which he has a right. See State v. Sandon, 161 Ariz. 157, 158 (189); State v. Shattuck, 140 Ariz. 582, 585 (1984). As there is no right of appeal to the Arizona Supreme Court except in cases where a life sentence or the death penalty is imposed, see Ariz. Rev. Stat. § 13-4031

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3. The Honorable Donald P. Lay, Senior United States Circuit Judge for the United States Court of Appeals, Eighth Circuit, sitting by designation.

(1989), we have ruled that post-conviction review before the Arizona Supreme court is a remedy that is "unavailable" within the meaning of Boerckel. See Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999). We therefore reverse the district court's judgement and remand the case for reconsideration in light of our decision in Swoopes.

REVERSED AND REMANDED.

APPENDIX B

Filed
Jul 31 2000
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN DEE POLSTON	)	
	)	No. 99-15472
Petitioner-Appellant,	)	D.C. No. CV-97-00019-JMR
	)	
v.	)	
	)	ORDER
TERRY L. STEWART	)	
	)	
Respondent-Appellee.	)	
	)	

Before: LAY,[1] D.W. NELSON, and THOMAS, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Thomas voted to deny the petition for rehearing en banc. Judges Lay and Nelson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P.35.)

1. The Honorable Donald P. Lay, Senior United States Circuit Judge for the United States Court of Appeals, Eighth Circuit, sitting by designation.

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

Supreme Court, U.S.
FILED

00 779 OCT 23 2000

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART; JANET NAPOLITANO,
ATTORNEY GENERAL,
PETITIONERS,

-vs-

KEVIN DEE POLSTON,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JANET NAPOLITANO
ATTORNEY GENERAL

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ATTORNEYS FOR PETITIONERS

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

_x_FILED ___LODGED
___RECEIVED ___COPY
Jan 12 1999
Clerk U S District Court
District of Arizona
BY_____DEPUTY

KEVIN DEE POLSTON,

Petitioner,

vs.

TERRY L. STEWART,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No. CV 97-019 T-JMR

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is DENIED.

IT IS FURTHER ORDERED, that this case is DISMISSED.

JANUARY 11, 1999
DATE

RICHARD H. WEARE
CLERK

S/ M. HARDEMAN
(By) Deputy Clerk/Marilyn Hardeman

COPIES TO: ROBERTS, YANKOWSKI, STEWART, Ord. Bk., JMR

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

_x_FILED ___LODGED
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Jan 12 1999
Clerk U S District Court
District of Arizona
BY_____DEPUTY

KEVIN DEE POLSTON,	)	
	)	
Petitioner,	)	
	)	No. CV 97-019 T-JMR
vs.	)	
	)	
TERRY L. STEWART,	)	ORDER
	)	
Respondent.	)	
	)	

Before the Court is Kevin Dee Polston's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated below, his request for relief is denied.

Background

Petitioner was indicted on August 10, 1990, on five counts of armed robbery, six counts of aggravated assault, six counts of burglary, and one count of attempted robbery. Thereafter, on August 16, 1990, Petitioner was indicted on another count of armed robbery. The cases were consolidated for trial.

Two weeks before trial Petitioner's defense counsel asked the trial court to order a complete Rule 11 competency evaluation.[1] On April 17, 1991, the trial court held a hearing to determine if there were reasonable grounds to hold a Rule 11 competency hearing. Petitioner's counsel informed the trial court that he had requested the competency hearing because of a deterioration in his client's rationality. Petitioner's trial counsel also informed the trial court that he had not had a chance to review the court clinic evaluation. The court relied on a psychiatric report prepared by Dr. Flynn. In his pre-Rule 11 hearing report, Dr. Flynn noted that Petitioner voiced "extreme religious beliefs which included the decision to give over to God total power of his life and power over all decisions that he might make" and that his religious beliefs lead to fasting. The trial judge denied the Rule 11 motion and refused to order a Rule 11 evaluation.

After trial the jury convicted Petitioner of all 19 counts. As the only witness for the defense at trial, Petitioner testified at trial and admitted his involvement in each of the offenses. Petitioner was sentenced to 28 years imprisonment.

Petitioner filed a petition for post-conviction relief on October 26, 1993. Petitioner alleged that he was incompetent during plea bargaining and at trial, and that his trial counsel was ineffective. The basis for the incompetency claim was that Petitioner refused a plea bargain that would have given him a more lenient sentence than that imposed after the trial. During plea negotiations, Petitioner informed counsel that he would look to God for guidance and that he did not believe God desired that he accept the plea bargain.

The ineffective assistance of counsel claim is based on the failure of Petitioner's trial counsel to renew his request for a competency hearing after reviewing Dr. Flynn's evaluation of Petitioner. Dr. Flynn

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1. Under Ariz.R.Crim.Pro. 11.2 the state court must hold a competency examination when there are "reasonable grounds" to question a defendant's competency.

believed that further evaluation may have been appropriate, but decided that Petitioner did not suffer from an emotional disorder.

In March 1994, the trial court held a two-part evidentiary hearing regarding the petition for post-conviction relief at which two of Petitioner's former attorneys and two expert witnesses testified. The trial court denied relief. The trial court also denied a motion for rehearing, but granted Petitioner's request for a delayed appeal.

Petitioner appealed and filed a petition for review.

Discussion

Defaulted Claims

A federal court cannot grant relief to a prisoner's section 2254 habeas petition unless the prisoner has exhausted all of his claims in state court. See Coleman v. Thompson, 501 U.S. 722, 731-32 (1989). This is referred to as the "exhaustion requirement." Id.

To exhaust state remedies, the petitioner must have afforded the state's highest court the opportunity to rule upon the merits of the federal constitutional claim by fairly presenting the claim to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351 (1989). A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which the claim is based. See Picard v. Connor, 404 U.S. 270, 277-78 (1971). However, if a petitioner fails to alert the state court that he or she is raising a federal constitutional claim, the federal claim is unexhausted regardless of its similarity to the issues raised in state court. See Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996). As stated by the Supreme Court, "[i]f a habeas petitioner wishes to claim that . . . a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court but in state court." Duncan v. Henry, 513 U.S. 364, 365 (1995). Once the petitioner has afforded the state's highest court an opportunity to rule upon the merits of the alleged federal constitutional violation, the

petitioner has complied with the exhaustion doctrine and the federal district court may review the claim on the merits. See Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

If the petitioner has failed to fairly present a claim to the state's highest court in a procedurally appropriate manner, state court remedies may nonetheless be exhausted. First, a state court may have already found a petitioner's claims defaulted because he or she failed to follow proper state procedures in attempting to raise the claims in state court. See Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 2594 (1991); Coleman, 501 U.S. at 729-30. Second, the petitioner may not have presented the claim to the state court, but, pursuant to the state court's procedural rules, a return to state court would be futile in that no state remedies remained available at the time of filing the federal habeas petition. See Harmon v. Ryan, 959 F.2d 1457, 1460 (9th Cir. 1992); McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1986); Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle, 456 U.S. at 125 n.28). In such situations, the petitioner has procedurally defaulted on such claims, and the claims are "technically" exhausted.

Generally, a procedurally defaulted claim will not be considered on a writ of habeas corpus without a finding of "cause and actual prejudice" for the default or a showing that the failure to consider the claims will result in a fundamental miscarriage of justice. See Harris v. Reed, 489 U.S. 255, 262 (1989); Harmon, 959 F.2d at 1461. However, the doctrine of procedural default is based on comity, not jurisdiction, and federal courts may consider the merits of procedurally defaulted claims even without a showing of cause and prejudice where the state procedural bar is not independent of the federal claim or is "inadequate" to warrant the abstention of federal review. See Harmon, 959 F.2d at 1461.

In this matter, Respondent concedes that Petitioner's competency claim has been properly exhausted. Accordingly, the Court may reach the merits of that claim. Petitioner has not, however, properly exhausted all of his ineffective assistance of counsel claims. The only

ineffective assistance of counsel claim that is properly exhausted is the claim that counsel provided ineffective assistance by failing to pursue another Rule 11 examination after the trial court denied the first request. Accordingly, the Court may only consider Petitioner's remaining ineffective assistance of counsel claims if he has demonstrated cause and prejudice.

Despite having ample opportunity to present a cause and prejudice showing, Petitioner's briefs do not address this issue. As a result, the Court will consider only Petitioner's competency claim and his ineffective assistance of counsel claim regarding the Rule 11 competency hearing.

Competency

Petitioner asserts that his due process rights were violated because he was incompetent during plea bargaining and trial. Both of these claims are properly exhausted and before the Court. A defendant may not stand trial if he is incompetent. See Godinez v. Moran, 509 U.S. 389, 396 (1993). "The standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Id. (quoting Dusky v. United States, 362 U.S. 402 (1960)).

State court findings of fact are entitled to a presumption of correctness. See 28 U.S.C. § 2254(d)(8) (stating that state court findings of fact should be accepted if "fairly supported by the record"). See also Rector v. Clark, 923 F.2d 570, 573 (8th Cir. 1991). After reviewing a psychological evaluation prepared for the hearing on Petitioner's Rule 11 motion, the trial court necessarily found that there were not reasonable grounds to believe that Petitioner was incompetent. Prior to reaching its decision the trial court considered a report by clinical psychologist Todd Flynn. Dr. Flynn wrote in his report:

> [Petitioner] does not show any of the emotional or cognitive signs or symptoms of a psychotic-level disorder. There is no

evidence that he suffers from any acute, psychotic-level disorder of the sort that can be found in the DSM-III-R.

Flynn Report, April 16, 1991, p.3.

Dr. Flynn stated that Petitioner's "religious beliefs are extreme and would be considered fanatic by many lay people and professionals." Report, at 5-6. However, Dr. Flynn stated that Petitioner had "an excellent understanding of . . . his specific legal situation." Report, at 4. He stated, "there is no question about Mr. Polston's ability to acquire a rational and factual understanding of the legal procedure which he faces." Id. Furthermore, the trial court expressly stated that Petitioner possessed the "mental capabilities to understand the proceedings." See Defendant's Answer, Ex. C at 4.

After the trial, the trial court held an evidentiary hearing regarding Petitioner's request for post-conviction relief. The core issue of the hearing was to determine Petitioner's competency before and during the trial. The trial court stated that it would grant Petitioner's motion for post-conviction relief if it found him to be incompetent during the trial. Thereafter, the trial court denied the motion for post-conviction relief. Accordingly, the trial court found Petitioner to have been competent. The pre-Rule 11 hearing and the post-conviction relief findings are entitled to a presumption of correctness. See Demosthenes v. Baal, 495 U.S. 731, 734 (1990) ("[A] state court's conclusion regarding a defendant's competency is entitled to such a presumption.")

Petitioner's main argument that he was incompetent flows from his religious activity during the criminal proceedings. Petitioner made decisions by reading his Bible, praying, and fasting. Petitioner refused to accept the plea agreement because he believed that God wanted him to accept whatever consequences God willed.

Petitioner relies on the testimony of Dr. Joseph Geffen to establish his incompetence. Dr. Geffen, after conducting a retroactive competency evaluation of Petitioner two and one-half years after the trial, testified that he believed that Petitioner "probably was

incompetent" immediately prior to, and during, his trial. R.T., March 7, 1994, at 42. He conceded, however, that Petitioner possessed a factual understanding of the proceedings and had never been diagnosed with a mental illness. R.T., at 49. Furthermore, Dr. Geffen conceded that the only evidence of Petitioner's incompetence during the trial was his refusal to accept the plea offer. R.T., at 74.

Dr. Geffen based his opinion that Petitioner was incompetent during and before trial, in part, on his belief that Petitioner heard "voices." The record, however, demonstrates that Petitioner expressly denied hearing God's audible voice. Rather, Petitioner believed God directed him through the Bible and in an internal sense of direction.[2]

Dr. Geffen also based his opinion on Petitioner's refusal to accept a plea offer. This is not incompetence. A defendant is not incompetent because he chooses a course of action that his counsel or the majority of defendants would not choose. In Whitmore v. Arkansas, 495 U.S. 149, 165 (1990), a defendant who had been sentenced to death refused to appeal his capital sentence although counsel had explained to him that he had several grounds for appeal. Id. He believed that it would be "a terrible miscarriage of justice for a person to kill people and not be executed." Id. (citations omitted). Despite the defendant's choice to accept his capital sentence without appealing, the Supreme Court found that he was competent. Id.

A defendant is incompetent if he cannot provide assistance to counsel because he does not understand the nature of the legal proceedings against him. See Godinez, 509 U.S. at 396. After conducting a Rule 11 evaluation of Petitioner, Dr. Flynn stated that "Mr. Polston shows an excellent understanding of the legal system generally and his specific legal situation." Flynn Report, at 4. Furthermore, Dr. Flynn determined that "there is no question about Mr. Polston's ability to acquire a rational and factual understanding of the

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2. Dr. Geffen concedes that Petitioner understood the nature of the proceedings, the role of the attorney, the prosecutor, the judge, the jury, and the questions asked him at trial.

legal procedure which he faces. He is well able to cooperate with counsel in preparing a defense in his case." Id. at 4-5.

Even without a presumption that the trial court was correct, the record indicates that Petitioner was competent at trial and during plea negotiations. A criminal defendant's willingness, motivated by religious conviction, to accept the likelihood of a lengthier sentence is not incompetence. Cf. Whitmore, 495 U.S. at 165.

Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, Petitioner must show that (1) his counsel's performance was deficient; and (2) the deficiency prejudiced the Petitioner. See Strickland v. Washington, 466 U.S. 668, 687 (1984); James v. Borg, 24 F.3d 20, 26 (9th Cir.), cert. denied, 513 U.S. 935 (1994). Assertions of ineffective assistance of counsel present mixed questions of fact and law, Strickland, 466 U.S. at 689, but the Court should give deference to state court findings of fact. See 28 U.S.C. § 2254(d).

Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 689-90. "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. To show deficient performance Petitioner must demonstrate that his counsel's representation was "below an objective standard of reasonableness." Id. at 688-89. Furthermore, to establish prejudice, Petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Petitioner asserts that counsel should have renewed his request for a Rule 11 hearing after re[illegible]ving Dr. Flynn's Rule 11 report. Counsel's decision not to renew his request was reasonable. The trial court had already considered Dr. Flynn's report in its decision denying counsel's original request for a competency hearing. Although Petitioner asserts that the trial court misread Dr. Flynn's report, there

is no evidence of that in the record. Rather, the trial court demonstrated familiarity with Dr. Flynn's evaluation and relied on it in making her determination. Therefore, Petitioner's trial counsel acted reasonably by not renewing his request for a competency hearing.

Accordingly,

IT IS HEREBY ORDERED that the petition filed pursuant to 28 U.S.C. § 2254 is **DENIED** and this case is **DISMISSED**.

DATED this 8th day of January, 1999.

JOHN M. ROLL
United States District Judge

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